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Federal Communications Commission

DA 98-444

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DISPATCHED
Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),

Table of Allotments,

FM Broadcast Stations.

(Johnstown and Altamont, New York)

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MM Docket No. 98-31

RM-9227

NOTICE OF PROPOSED RULE MAKING

Adopted: February 25, 1998

Released: March 6, 1998

Comment Date: April 27, 1998

Reply Comment Date: May 12, 1998

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Hometown Broadcasting Corp. ("petitioner") requesting the reallocation of Channel 285A from Johnstown, New York, to Altamont, New York, as the community's first local aural service, and the modification of Station WSRD's license to specify Altamont as its community of license. Petitioner states that it will apply for the channel, if allotted.

2. Petitioner filed its request pursuant to Section 1.420(i) of the Commission's Rules which permits the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. See Modification of FM and TV Authorizations to Specify a New Community of License ("Modification of License"), 4 FCC Rcd 4870 (1989), recon. granted in part, ("Modification of License MO&O"), 5 FCC Rcd 7094 (1990). In support of its proposal, petitioner states that Altamont, with 1990 U.S. Census population of 1,519 people, is a village in the township of Guilderland. According to the petitioner, Altamont, which collects its own village taxes, has its own locally elected mayor and governing council, as well as its own police, fire, rescue squad, water and sewer departments, public library and a weekly newspaper, The Enterprise. In addition, petitioner states that Altamont is served by four different churches, numerous commercial businesses, and various community organizations, such as the Peter G. Young Community Center, a chapter of the Veterans of Foreign Wars, the American Legion, and the Altamont Community Caregivers. Further, petitioner points out that 200,000 to 250,000 people attend the Altamont Fair, the Altamont Antique and Craft show, the Altamont Scottish games and the Altamont Political Picnic. Petitioner further points out that the allotment of Channel 285A would provide Altamont with its first local aural service while not depriving Johnstown, with a 1990 U.S. Census population of 9,058 persons, of its sole local aural service because it will retain local service from co-owned daytime-only AM Station WIZR.

3. Petitioner states that approval of its request would result in a net population gain of 398,999 people within a 2,283 square kilometer area. This gain in population and area includes 119 people within an 8 square kilometer area which receive only 2 aural services, 484 persons within a 38 square kilometer area which receive 3 aural services and 186 persons within a 20 square kilometer area which receive 4 aural services. It acknowledges that Altamont itself currently receives at least 21 fulltime aural reception services and that the reallocation of Channel 285A will result in a loss of service to 103,602 people within a 1,936 square kilometer area. However, it states that Johnstown will continue to receive service from at least 15 fulltime aural stations, and the entire loss area will receive no less than five services. Therefore, petitioner states that the entire loss area is considered to be well-served. Further, in accordance with Commission precedent, petitioner contends that the fact that there will be a loss of service experienced by some people should not be a bar to favorable consideration of its request. In support, it cites LaGrange and Rollingwood, Texas, 10 FCC Rcd 3337 (1995) and Family Broadcasting Group, 53 RR 2d 662 (Rev. Bd. 1983). Petitioner also states that Altamont is not located within an Urbanized Area and the station will provide a 70 dBu signal over only 2% of the Albany-Troy-Schenectady Urbanized Area. Thus, it submits that it need not demonstrate that Altamont is sufficiently independent of the central city to justify a first local service preference.¹ Therefore, given the net increase in population served, petitioner contends that the reallocation would result in a preferential arrangement of allocations.

4. We would like to solicit comment on the petitioner's proposal. On the one hand, we recognize that the proposed reallocation and change of community of license to Altamont may result in a higher allocation priority than retaining the channel at Johnstown. Specifically, the reallocation appears to trigger a first local aural transmission service under priority 3. By way of contrast, retaining the channel and station at Johnstown appears to trigger priority 4 -- other public interest matters. Since the community of Johnstown would continue to have a local daytime-only station, retaining the petitioner's station at Johnstown may result in a first local nighttime transmission service or a second aural transmission service. While these are significant factors under priority 4, they have not been considered as significant as a first local transmission service. See Ravenswood and Elizabeth, West Virginia, 10 FCC Rcd 3181 (1995), Scotland Neck and Pinetops, North Carolina, 7 FCC Rcd 5113 (1992), recon. denied, 10 FCC Rcd 11066 (1995).

5. On the other hand, the Commission has recognized that in change of community cases "the public has a legitimate expectation that existing service will continue and this expectation is a factor we must weigh independently against the service benefits that may result from reallocating a channel from one community to another." See Modification of FM and TV Authorizations to Specify a New Community of License ("Community of License"), 5 FCC Rcd at 7097 (1990). In the instant case, petitioner has acknowledged that even though its proposal would result in a net gain of people served, there would be a loss of service to 103,602 people

¹ See Modification of License MO&O, supra, and Headland, Alabama, and Chattahoochee, Florida, 10 FCC Rcd 10352 (1995).

within a 1,936 square kilometer area. Nevertheless, the petitioner contends that no "underserved areas" would exist in the loss area because the loss area is entirely served by at least six radio signals. The staff, however, has performed a gain/loss study² which shows that the loss area will include 244 people within a 217 square kilometer area which will be left with only two fulltime services, 4,642 people within a 325 square kilometer area which will receive three fulltime services and 6,831 people within a 212 square kilometer area which will receive four fulltime services.³ Therefore, the reallocation would appear to cause a greater population to become underserved (6,831 people will go from five to four services) than would become better served (789 people would receive third, fourth or fifth service). In view of the fact that it appears that a substantially larger number of people will become underserved than well-served if Channel 285A is reallocated to Altamont, petitioner is requested to provide further information as to the overall public interest benefits that would accrue from the reallocation.

Technical Summary

6. Channel 285A can be allotted to Altamont in compliance with the Commission's minimum distance separation requirements with a site restriction of 8 kilometers (5 miles) southwest of the community to accommodate petitioner's desired transmitter site.⁴ Canadian concurrence in the allotment is required since Altamont is located within 320 kilometers (200 miles) of the U.S.-Canadian border. In accordance with Section 1.420(i) of the Commission's Rules, competing expressions of interest in use of Channel 285A at Altamont will not be accepted since the allotment of Channel 285A at Altamont is mutually exclusive with its allotment at Johnstown as the communities are located approximately 55 kilometers apart while the Commission's Rules specify a minimum distance separation of 115 kilometers for co-channel Class A allotments.

7. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

<u>City</u>	<u>Channel No.</u>	
	<u>Present</u>	<u>Proposed</u>
Altamont, New York	--	285A
Johnstown, New York	285A	--

² The staff study was conducted using the maximum facilities for the Johnstown station, operating omnidirectionally. See, Harrisburg and Albemarle, North Carolina, 11 FCC Rcd 2511 (1996).

³ We recognize that petitioner's engineering study was conducted using the actual facilities of the Johnstown station operating with a directional antenna. However, even using these facilities, the staff study shows that 6,861 persons will lose their fifth service and 1,914 persons will lose their fourth service.

⁴ The coordinates for Channel 285A at Altamont 42-38-07 North Latitude and 74-04-30 West Longitude.

8. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

9. Interested parties may file comments on or before April 27, 1998, and reply comments on or before May 12, 1998, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Richard R. Zaragoza
Jason S. Roberts
Fisher Wayland Cooper Leader & Zaragoza, L.L.P.
2001 Pennsylvania Avenue, NW
Suite 400
Washington, D.C. 20006
(Counsel to petitioner)

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an ex parte presentation

and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Attachment: Appendix

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off protection. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules).

(b) With respect to petitions for rule making which conflict with the proposals in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Center (Room 239) at its headquarters, 1919 M Street, N.W., Washington, D.C.